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No. 665

IN THE

Supreme Court of the United States

October Term 1952

JACOB LICHTER AND JENNIE L. LICHTER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRAYER

Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 19th, 1952.

OPINIONS BELOW

The decision of the Tax Court of the United States, including its Findings of Fact and its Opinion, was rendered on the 7th day of January, 1952, is contained in the Record herein at page 97, and is reported in 17 T.C. 1111.

The Opinion of the United States Court of Appeals was rendered on the 19th day of December 1952, and is unreported. A copy thereof is set forth in the Appendix hereto at page 7a.

JURISDICTION

Jurisdiction of this Court with respect to the within matter and petition is had by virtue of the Sections 1254 and 2101 of the Judicial Code as contained in Title 28 of the *United States Code*, and as set forth in 28 *United States Code Annotated* Sections 1254 and 2101.

QUESTIONS PRESENTED

Whether payments made by Southern Fireproofing Company (a partnership composed of petitioners), to the Central Trust Company, Trustee of Petitioners' Bonus and Profit Sharing Plan, are deductible by Petitioners for income tax purposes for the calendar years 1942 and 1943, under and by virtue of the provisions of Sections 165 and 23(p)(1)(A) and (D) of the *Internal Revenue Code.*

STATUTES INVOLVED

The following statutes are involved herein:

Section 23(p)(1)(A) and (D) of the Internal Revenue Code which is set forth in the Appendix hereto at page 2a.

Section 165 of the Internal Revenue Code which is set forth in the Appendix hereto at page 1a.

Treasury Regulations 111 are also involved. Sec. 29.23(p)-1 and Section 29.23(p)-11 thereof are likewise set forth in the Appendix hereto at page 3a.

STATEMENT OF CASE

Petitioners, Jacob Lichter and Jennie L. Lichter, are husband and wife, and partners of the Southern Fireproofing Company, masonry contractors, with offices at 907 Federal Reserve Bank Building, Cincinnati, Ohio.

In 1941, Petitioners, as such partners, inaugurated a Bonus and Profit Sharing Plan for certain of its employees. In the calendar years 1942 and 1943, Petitioners, as such partners, made payments for specifically named employees to The Central Trust Co., of Cincinnati, Ohio, the duly authorized and appointed Trustee of the Bonus and Profit Sharing Plan.*

Respondent disallowed the deductions taken by Petitioners on the firm's income tax return for the aforementioned payments, and increased Petitioners' net income to that extent. In the Tax Court and the U. S. Court of Appeals, Respondent's action in this respect was affirmed. The U. S. Court of Appeals opinion is made a part of this Petition by attachment in the Appendix (Page 7a hereof).

The issues in the Tax Court and in the U. S. Court of Appeals were:

(a) Whether the payments into the Bonus and Profit Sharing trust in 1942 were for the exclusive benefit of the employee-beneficiaries within the meaning of Section 165 (a)(2) of the Internal Revenue Code and accordingly deductible under 23(p)(1)(A) and

(b) Whether the payments in 1942 and 1943 were deductible under Section 23(p)(1)(D) of said Code for the reason that the employees' rights with respect thereto were "nonforfeitable" without regard to whether the Plan complied with Section 165(a)(2) of the Code.

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* Note: In the Tax Court the validity of the partnership was assailed by Respondent, but the Tax Court reversed Respondent on this issue. It was not an issue in the Court of Appeals.

Petitioners argued in the Tax Court and in the U. S. Court of Appeals, that the trust was for the exclusive benefit of their employees and that the payments in 1942 were properly deductible under 23(p)(1)(A) of the Internal Revenue Code, and that with reference to 1942 and 1943 payments, an enforceable beneficial interest was granted to the employees at the time the payments were made, viz., the employees' rights were "nonforfeitable," and thus payments for both of said years were deductible under 23(p)(1)(D). In this respect Petitioners demonstrated:

(1) That the preamble portions and the whereases of the agreement state that it is for the exclusive benefit of the employees (R. p. 61).

(2) That the duties, acts and authority of the Advisory Board are limited, and in no instance may the Advisory Board divest the employees of the interest assigned to them in the trust (R. p. 61-62).

(3) That upon the payments being made by the Trustee, either bonds or insurance were purchased for the specifically named employees, and separate accounts set up for such employees on the books of the Trustees (R. p. 52).

(4) That in many instances, the named employees have withdrawn the bonds or insurance assigned to them, or both (R. p. 54-57); that the actions of the parties in their interpretation of the agreement, should not be ignored.

(5) That, finally, Article IX of the Trust Agreement states as follows (R. p. 64):

"Notwithstanding anything in this agreement to the contrary under no circumstances shall any policy or the proceeds thereof, or any other property or assets of this trust, revert to the employer, nor shall the employer be entitled to exercise any rights or options in regard to said policies, property or assets, or derive any benefits therefrom."

and thus, the res of the trust was not only for the exclusive benefit of employees, but also the interest of employees in the res was nonforfeitable.

On the 26th day of January, 1948 (*Note*: the Tax Court proceedings were docketed August 1, 1949), the Administrator of a deceased employee brought suit against The Central Trust Company, Trustee, the Advisory Board and Petitioners, in the Common Pleas Court, Hamilton County, Ohio; this suit was entitled *C. W. Steinkamp, Administrator of the Estate of H. L. Pullen, deceased, and Mary Louise Pullen, sole heir and beneficiary under the will of H. L. Pullen* v. *Central Trust Company, O. H. Utz, Secretary, Advisory Board, Bonus and Profit Sharing Plan, Southern Fireproofing Company and Jacob and Jennie L. Lichter*, being numbered A-108490 in the records of said court.

The prayer of this suit sought to compel The Central Trust Co., as such Trustee, to deliver the bonds held for Herbert L. Pullen, a deceased employee, to his estate.

Petitioners resisted the employee's action for the reason that if the Common Pleas Court case ordered delivery of the bonds, *and* if Respondent were not overruled in his disallowance of the deductions involved herein, Petitioners would have made payments to employees under said plan and would not receive deductions therefor on their income tax returns.

The Trial Court in said suit ordered that the bonds should be delivered to the Administrator of Herbert L. Pullen, deceased, the former employee, and upon a finding that *the property of the trust could in no event revert to Petitioners.*

Petitioners appealed and the Ohio Court of Appeals in a trial de novo likewise ruled in favor of the Administrator of the deceased employee, and ordered the bonds to be delivered to the employee's Administrator, for the reason that the employee had a valid, enforceable interest in the

property of the trust in his name and that the property of the trust may not revert to Petitioners. The Ohio Court of Appeals order is made a part of this Petition by attachment in the Appendix (Page 9a hereof). The Ohio Court of Appeals opinion and order were both entered *subsequent* to the opinion and order of the U. S. Court of Appeals below.

Petitioners have filed a petition for certiorari to the Supreme Court of Ohio which is presently pending. Should the Ohio Supreme Court grant certiorari and reverse the Ohio Court of Appeals, Petitioners would have no further desire to prosecute this petition. This petition is filed now, rather than after final determination by the Ohio Supreme Court, as there is a likelihood that no determination will be had by the Ohio Supreme Court within the 90 day period following the U. S. Court of Appeals order, within which time Petitioners must file this petition.

Throughout this petition it will be assumed that the Ohio Court of Appeals is affirmed by the Ohio Supreme Court. In case of a reversal, this petition will be dismissed. Petitioners will file a supplementary information to this Court at the time of a determination by the Ohio Supreme Court.

We respectfully suggest that this Court might properly withhold its decision upon this petition pending such determination by the Ohio Supreme Court.

REASONS FOR GRANTING WRIT

and

ARGUMENT IN SUPPORT THEREOF

The reason for granting this Writ is that the U. S. Court of Appeals below has rendered a decision in direct conflict with applicable local decisions on an important question of local law.

The conflict is simple and clear:

The Ohio Court of Appeals has interpreted the Ohio trust in question as creating nonforfeitable interests in its employee beneficiaries; a state of the law which *should* amply satisfy the requirements of Sec. 23 (p)(1)(D) of the Revenue Code as to tax deductibility.

Nevertheless a U. S. Court of Appeals in a decision made, unfortunately, *prior* to the Ohio decision, and without benefit of this Ohio holding as to the particular trust in question, has held that payments into this trust are *not* nonforfeitable and has therefore denied to Petitioners the right to deduct them for income tax purposes.

This direct conflict between a U. S. Court of Appeals and a State Court of Appeals is one which, if not remedied, will result in unfair injury to Petitioners' rights. We submit that it is not consistent with the philosophy of the American court system for this sort of judicial schizophrenia to remain unremedied, and that to afford such a remedy is an apt and urgent reason why this Court should grant certiorari here.

The question decided by the U. S. Court of Appeals was basically one of Ohio law, namely, whether the particular trust in question, by its terms, rendered the rights of its employee beneficiaries in the trust res nonforfeitable at the time of a payment into such a trust.

However, see *Forsyth* v. *Hammon*, 17 Sup. Ct. 665, 166 U. S. 506, to the effect that this Court should exercise its jurisdiction to resolve a conflict between a state and a federal court even though the question is not one of local law.

Petitioners, to use the vernacular, have been caught "coming and going." The U. S. Court of Appeals has said that they may not deduct payments into the trust in question as the trust res is not nonforfeitable to their employees. The Ohio Court of Appeals has said that they may not recover back trust assets since the trust res is specifically nonforfeitable.

We urge that to resolve such a dilemma is a situation uniquely fitted to the exercise of this Court's jurisdiction.

While it is recognized that deductions from gross income are matters of legislative grace, as has been said by this Court on several occasions, it is nevertheless proper to point out that when business expenses are made in good faith, they should be deductible unless the reasons for not permitting them are quite clear, especially in an instance like this, when the matter involves payments to employees in payment for meritorious services. Petitioners quite properly feel aggrieved when, on the one hand, the State Court says to Petitioners' Trustee "hand over the bonds to the employees" and to Petitioners "you have no right to the bonds, it's a valid and enforceable trust"; and when, on the other hand, the United States Court of Appeals says that the interests of the employees are not nonforfeitable, and therefore the payments are not deductible.

It should be pointed out also that the U. S. Court of Appeals is in error in its consideration of the matter. While we realize that mere error is not usually enough to justify the exercise of the Court's jurisdiction to grant a petition for certiorari, the Court might indeed hesitate to exercise its discretion for other reasons if it felt that the Court of Appeals was correct in its consideration of the issues. We therefore feel it proper to briefly state the reasons why the Court of Appeals is in error.

Section 165 Internal Revenue Code, as it existed and as it was applicable for the calendar year 1942 (1938 Act) is as follows:

> Sec. 165. EMPLOYEES' TRUSTS.
>
> (a) Exemption from Tax.—A trust forming part of a stock bonus, pension, or profit sharing plan of an employer for the exclusive benefit of some or all of his employees

1) If contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, and

2) If under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees, shall not be taxable under Section 161. . . .

Section 23(p)(1)(A) and (D) Internal Revenue Code, as it was applicable for both the calendar years here involved—1942 and 1943—is as follows:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions: * * * * * *

(p) Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation under a Deferred-Payment Plan.

(1) General rule.—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under subsection (a) but shall be deductible, if deductible under subsection (a) without regard to this subsection, under this subsection but only to the following extent:

(A) In the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 165(a), in an amount determined as follows:

* * * * * *

(D) In the taxable year when paid, if the plan is not one included in paragraphs (A), (B) or (C), if the

> employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid.

With respect to the payments made to the Trustee of Petitioners' Bonus and Profit Sharing Plan in 1942 the Tax Court held (R. p. 110):

(a) That the Plan did not comply with Section 165 and therefore that 23(p)(1)(A) did not apply; and

(b) That 23(p)(1)(D) did not apply because the employees' rights to the payments made into trust were not nonforfeitable at the time the payments were made.

Section 165 (supra p. 8) says only (a) that the contribution must be for the purpose of distributing a fund to the employees in accordance with a plan and (b) that no part of the fund can be directed to a purpose other than the benefit of the employees.

Both of these standards are met.

As to (a) there is no comment by the court: the Plan (Exhibit 26; R. p. 61) is for the purpose of distributing a fund to employees in accordance with its provisions.

As to (b) the Trust Agreement itself is clear that the fund cannot be directed to a purpose other than for the benefit of the designated employees of the Southern Fireproofing Company.

The "Whereases" of the Plan (Exhibit 26; R. p. 61) are:

> WHEREAS, the Employer desires to reward and compensate certain of its employees for their faithful and beneficial services rendered the Employer, in such a manner as will establish protection and security to the employees and their respective families, and dependents, and
>
> WHEREAS, the Employer desires to deposit with the Trustee such sums of money or property for the benefit of such employees and their respective families and dependents with the specific intent of carrying out its said purposes;

Article IX of the Plan is:

> Notwithstanding anything in this agreement to the contrary, under no circumstances shall any policy or the proceeds thereof, or any other property or assets of the trust revert to the Employer, nor shall the Employer be entitled to exercise any rights or options in regard to said policies, property or assets, or derive any benefits therefrom.

We submit that under the terms of the trust, neither the Trustee nor the Advisory Board may perform any act inconsistent with the foregoing language. *Only* Petitioners' employees may benefit.

And quite apart from the statements in the Trust Agreement itself as to the employees' sole interest, the evidence shows (this brief p. 4; R. p. 52), not only that the Trustee set up ownership accounts on its books for employee-beneficiaries, but that many of the employees have been paid in accordance with the directions of the Advisory Board at the time the contributions were made by Petitioners.

The factors relied upon by the Tax Court (R. p. 97-110) and the U. S. Court of Appeals, indicating that the plan was not for the exclusive benefit of the employees are: that the powers of the Trustee are limited; that the Advisory Board is appointed by the employer; that the employer has the right to amend; and that there are no standards for individual sharing.

None of these factors prevent the Plan from complying with the applicable legislation for the calendar year 1942. These factors do not prevent the trust from being for the exclusive benefit of the employees as a group. This is indisputably shown by two things: (a) the employer may not get back any part of the trust nor may it be diverted to anyone other than employees; (b) the trust is created for the benefit of "employees" directly, or indirectly by providing security for their families. Thus the requirement of the statute is met.

The U. S. Court of Appeals may have been confused by the emphasis placed on the individual employee's right to what had been placed to his name. The Court should keep in mind that it is the "employees' " interest, *as a group*, which the statute looks at.

This is not a factor which permits the court to strike down the Plan, because it does not show that the Plan was not for the exclusive benefit of the employees as a group nor do they show that the interests of the group of employees are not nonforfeitable.

Admittedly the Plan does not comply with the standards of the applicable legislation for the calendar year 1943, *but it makes no difference whether Plan does or does not comply* because Section 23(p)(1)(D) permits the deduction *nevertheless* if the employees' interests are nonforfeitable. The interests of the employees are nonforfeitable, as we have shown above, and as the Ohio Court of Appeals has held.

The Court can fairly ask then, wherein is the difference if payments are deductible whether the trust be a complying one or a non-complying one. The difference is in the treatment of the employees' interest, which is not here involved. Under the qualified trust the employees' interest is not taxed until it is made available to them; under a non-qualified trust the employees' interest is taxable to them when it becomes nonforfeitable. (The Tax Court excluded proffered evidence of Petitioners that the employees for whose benefit contributions were made in 1942-43 had been taxed on such contributions.)

In summary, then, the trust agreement itself, as well as the course of action taken by all the parties thereunder, shows that it was Petitioners' intent to have a bonus and profit sharing plan for the exclusive benefit of the employees and that the interests of the employees were to be considered to be nonforfeitable.

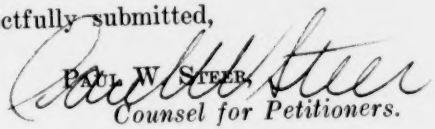
Accordingly, the U. S. Court of Appeals was in error in its consideration of the matter.

In any event, Petitioners are caught in-between the conflict in rulings between the State Court and the Federal Court, and relief should be afforded. Petitioners, in fairness and in equity, should either be entitled to funds deposited or the deduction—one or the other.

CONCLUSION

For the reasons aforementioned, Petitioners respectfully pray that a Writ of Certiorari issue to the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 19, 1952.

Respectfully submitted,



PAUL W. STEER,
Counsel for Petitioners.

APPENDIX

APPENDIX

ATTACHMENT A

Section 165 Internal Revenue Code

SEC. 165 [As amended by Section 162(a) of the Revenue Act of 1942, *supra*]. EMPLOYEES' TRUSTS.

(a) *Exemption from Tax.*—A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall not be taxable under this supplement and no other provisions of this supplement shall apply with respect to such trust or to its beneficiary—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

* * * * * *

ATTACHMENT B

Section 29.23 (p)-(1) Internal Revenue Code

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat 798] *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

* * * * * *

(p) [As amended by Section 162(b) of the Revenue Act of 1942, *supra*] *Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred-Payment Plan.*—

(1) *General Rule.*—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under subsection (a) but shall be deductible, if deductible under subsection (a) without regard to this subsection, under this subsection but only to the following extent:

(A) In the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 165(a), * * *

* * * * * *

(D) In the taxable year when paid, if the plan is not one included in paragraphs (A), (B), or (C), if the employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid.

ATTACHMENT C

Treasury Regulations 111: Sec. 29.23 (p)-(1), (11)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(p)-1. CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED PAYMENT PLAN.—*In General.*—Section 23(p) prescribes limitations upon deductions for amounts contributed by an employer under a pension, annuity, stock bonus, or profit-sharing plan, or under any plan of deferred compensation. It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees. Section 23(p) does not cover contributions or compensation which give the employee or former employee present benefits such as life insurance protection. The cost of such benefits is deductible to the extent allowable under section 23(a). See section 29.165-6. Section 23(p), however, is applicable to all contributions under a stock bonus, pension, profit-sharing, or annuity plan, whether or not the employee's rights in such contributions are nonforfeitable.

A contribution to be deductible under section 23(p) must be an ordinary and necessary expense which would be deductible under section 23(a) if it were not for the fact that the statute specifically provides that it shall be deductible under section 23(p). A contribution by a corporation under a plan which is created primarily for the purpose of benefiting shareholders of the company is not deductible. Such contribution may constitute a dividend within the meaning of section 115(a). A contribution under a plan that is set up for the exclusive benefit of employees as such, and thus represents an item of expense, is of the nature of compensation for personal services rendered by the employees covered by the plan. The amount of contributions allowable as a deduction has an over-all limitation—the entire contributions for the taxable year when added to other compensation paid must represent reasonable compensation for services rendered by the employee beneficiaries. In the case of contributions for pensions for employees, any contributions on behalf of an employee in

excess of the amount necessary to provide a reasonable pension for the employee in view of his past and current services is not deductible. What constitutes a reasonable pension will depend upon the facts in the particular case. Compensation otherwise paid the employee, length of service, and retirement age are among the elements to be considered in determining what is a reasonable pension. In the case of a stock bonus or profit-sharing plan which provides for additional compensation for employees not paid as a pension, a contribution will not be fully deductible unless it can be justified as a reasonable addition to the compensation otherwise paid to employees who are beneficiaries under the plan. In addition to the over-all limitation referred to above, section 23(p) sets forth further limitations as to the amounts that may be deductible for the taxable year.

Section 23(p) is not confined to formal stock bonus, pension, profit-sharing, and annuity plans, or deferred compensation plans, but it includes any method of contributions or compensation having the effect of a stock bonus, pension, profit-sharing, or annuity plan, or similar plan deferring the receipt of compensation. Thus, a corporation paying pensions to such of its retired employees and in such amounts as may be determined from time to time by the board of directors or responsible officers of the company has a plan in effect that is governed by section 23(p). If an employer on the accrual basis defers paying any compensation to an employee until a later year or years under an arrangement having the effect of a stock bonus, pension, profit-sharing, or annuity plan, or similar plan deferring the receipt of compensation, he shall not be allowed a deduction until the year in which the compensation is paid. This provision is not intended to cover the case where an employer on the accrual basis defers payment of compensation after the year of accrual merely because of inability to pay such compensation in the year of accrual, as, for example, where the funds of the company are not sufficient to enable payment of the compensation without jeopardizing the solvency of the company, or where the liability accrues in the earlier year, but the amount payable cannot be exactly determined until the later year.

Deductions under section 23(p) are generally allowable only for the year for which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his return on the accrual basis. Exceptions are made in the case of overpayments as provided in sub-paragraphs (A), (C), and (F) of section 23(p)(1), and, as provided by section 23(p)(1)(E), in the case of payments made by a taxpayer on the accrual basis within 60 days after the close of the taxable year of accrual. This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation, provided payment is actually made within 60 days after the close of the year of accrual.

Any payments shall be disallowed as a deduction under section 23(p), if determined by the National War Labor Board, the Secretary of Agriculture, or the Commissioner to have been made in contravention of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes," as amended (Public Law 729, Seventy-seventh Congress; Public Law 34, Seventy-eighth Congress), or of the regulations, orders, or rulings promulgated thereunder.

SEC. 29.23(p)-11. CONTRIBUTIONS OF AN EMPLOYER UNDER A PLAN THAT DOES NOT MEET THE REQUIREMENTS OF SECTION 165(a) (SECTION 23(p)(1)(D)).—Subparagraph (D) of section 23(p)(1) covers all cases for which deductions are allowable under section 23(p)(1) but not allowable under subparagraphs (A), (B), (C), or (F) of such section. No deduction is allowable under section 23(p)(1)(D) for any contribution paid or accrued by an employer under a stock bonus, pension, profit-sharing, or annuity plan, or for any compensation paid or accrued on account of any employee under a plan deferring the receipt of such compensation, except for the year when paid, and then only to the extent allowable under section 23(p)(1). See section 29.23(p)-1. If payments are made under such a plan and the amounts are not deductible under the other subparagraphs of section 23(p)(1), they are deductible under subparagraph (D) to the extent that individual employees' rights to or derived from such employer's contribution or such compensation

are nonforfeitable at the time the contribution or compensation is paid. As to what constitutes nonforfeitable rights of an employee, see section 29.165-7. If an amount is accrued but not paid during the taxable year, or if paid during the taxable year and the employees' rights are forfeitable at the time the amount is paid, no deduction will be allowed the employer for such amount for such taxable year.

ATTACHMENT D

Opinion of the U. S. Court of Appeals

No. 11626

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB LICHTER, JENNIE L. LICHTER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW THE DECISION
OF THE TAX COURT OF THE UNITED STATES

(Filed Dec. 19, 1952)

Decided December 19, 1952.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

PER CURIAM. This petition for review of a decision of the Tax Court of the United States has been heard and considered on the record and on the briefs and oral arguments of the attorneys.

The petition avers that the Tax Court erred in holding that contributions made to a trust created by an instrument executed by a *bona fide* husband and wife partnership are not deductible on the income tax return of the petitioners, doing business as Southern Fireproofing Company, for the taxable years 1942 and 1943.

The findings of fact of the Tax Court are supported by substantial evidence and are accepted here as the facts of the case.

Under the pertinent provisions of the trust instrument, the duties, acts and powers of the Trustee were limited to the instructions given by an Advisory Board consisting of three members appointed by the petitioners to hold office as such until their successors are designated in writing, unless terminated earlier by death or resignation.

The trust instrument provided that the property and assets of the trust should not revert to the employer, but that the employer should have the right to amend or modify the trust agreement by instruments in writing directed to the Trustee, whose duties, powers, and liabilities should not be substantially changed or increased without the Trustee's written consent.

The instrument provided further that should the employer be judicially declared bankrupt or insolvent, or in the event of "dissolution, merger or consolidation," without provision for the continuance of the trust, the trust property should be distributed or disposed of in accordance with the instructions of the Advisory Board and, after such distribution, the trust should be terminated.

As stated by the Tax Court, the Advisory Board possessed full control over the disposition, allotment, investment or distribution of the trust assets, as well as authority to direct a change in beneficiary. The Trustee was empowered to purchase annuity or life insurance policies on such individuals or groups of individuals as the Advisory Board might direct. The Trustee was granted the right to change a beneficiary to a person, or persons, having an insurable interest in the insured life.

We agree with the Tax Court that, with respect to payments made in 1942, the trust was not for the exclusive benefit of the employees or their beneficiaries within the meaning of section 165(a)(2) of the Internal Revenue Code, and such payments were accordingly not deductible under section 23(p)(1)(A) of the Code.

We also agree with the conclusion of the Tax Court that the contributions made to the trust in 1942 and 1943 were not non-forfeitable within the meaning of section 23(p)(1)(D) of the Internal Revenue Code.

We reason with the Tax Court, too, that no enforceable beneficial interest is granted to any person by the trust instrument, for the trust assets could be disposed of or distributed in any manner chosen by the Advisory Board in its discretionary power.

In our judgment, the Tax Court correctly held that the deductions claimed by the taxpayers are not allowable; and, therefore, its decision is affirmed.

ATTACHMENT E

Order of the Ohio Court of Appeals

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
(Entered February 25, 1953)

C. W. STEINKAMP, SR., Administrator of the Estate of Herbert L. Pullen, Deceased; MARY LOUISE PULLEN, Widow of Herbert L. Pullen, Deceased, and Sole Beneficiary of His Estate,

Appellees,

v.

THE CENTRAL TRUST COMPANY, an Ohio Corporation; JACOB LICHTER and JENNIE L. LICHTER, Individually and as Partners Doing Business as Southern Fireproofing Company, a Partnership; MRS. O. H. UTZ, Individually and as Chairman of the Advisory Board of the Bonus and Profit Sharing Plan of Southern Fireproofing Company, a Partnership,

Appellants.

No. 7521

DECREE

Enter, MATTHEWS, P. J.

This appeal came on to be heard on the evidence as contained in the Stipulation of Facts, the briefs and statements of counsel, and the Court finds that the issues hereof, wherein plaintiffs (whose rights are derivative of Herbert L. Pullen, deceased, a former employee of Jacob Lichter and Jennie L. Lichter, as partners of Southern Fireproofing Company), seek to require The Central Trust Company, as Trustee of the Bonus and Profit-Sharing Plan of said Southern Fireproofing Company, to deliver to them bonds of the said Herbert L. Pullen held by it as such Trustee, should be determined in favor of plaintiffs, and that The Central Trust Company, as such Trustee, should deliver the bonds held by it in the name of and for the account of Herbert L. Pullen, to plaintiffs, as prayed for in said petition.

The Court further finds, for the reasons stated by the trial court in its opinion that the Bonus and Profit-Sharing Plan of said Southern Fireproofing Company, and the Trust Agreement thereof, are valid, and that defendants Jacob Lichter and Jennie L. Lichter, doing business as Southern Fireproofing Company as aforesaid, are bound by Section IX of said Trust Agreement, and accordingly that the bonds may not revert to them.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

(1) That defendant The Central Trust Company, Trustee, deliver said United States Savings Bonds, Series F, numbered V 115365 F, M 449487 F and C 546218 F to the Treasurer of the United States or his fiscal agent for re-issue in the name of plaintiff C. W. Steinkamp, Sr., Administrator of the Estate of Herbert L. Pullen, deceased.

(2) That upon receipt from the Treasurer of the United States or his fiscal agent of re-issued bonds in the name of plaintiff, C. W. Steinkamp, Sr., Administrator of the Estate of Herbert L. Pullen, deceased, the defendant The Central Trust Company, Trustee, deliver forthwith said re-issued bonds to plaintiff C. W. Steinkamp, Sr., Administrator of the Estate of Herbert L. Pullen, deceased.

(3) That all of the costs of this proceeding be paid by the defendants.

IT IS FURTHER ORDERED, that a mandate issue herefrom to carry this judgment into effect.

Have seen and approve:

DINSMORE, SHOHL, SAWYER & DINSMORE,

Attorneys for Appellees,

STEER, STRAUSS & ADAIR,
PAUL W. STEER,

Attorneys for Appellants.

CLERK'S CERTIFICATE

THE STATE OF OHIO, }
HAMILTON COUNTY } ss

I, Elmer F. Hunsicker, Clerk of the Court of Appeals of Hamilton County, Ohio, do hereby certify that the within and foregoing is a true and correct Transcript of the Decree Finding for Plaintiff (Entered Feb. 25, 1953, Minute 23) in Case No. 7521, wherein C. W. Steinkamp, Sr., Administrator and etc., et al., were Appellees and The Central Trust Company, an Ohio corporation, et al., were Appellants, as appears from the files and records now in my office.

IN TESTIMONY WHEREOF, I, the Clerk aforesaid, have hereunto set my hand, and affixed the Seal of the said Court, at Cincinnati, in said county, this 26th day of February A. D. 1953.

/s/ ELMER F. HUNSICKER,
Clerk Court of Appeals of Hamilton County, Ohio.

[SEAL]

STATE OF OHIO }
HAMILTON COUNTY } ss

I, Stanley Matthews, Presiding Judge of the Court of Appeals of Hamilton County, Ohio, the same being a Court of Law and Record in and for the County of Hamilton do hereby certify that Elmer F. Hunsicker is Clerk of said Court, and was such Clerk at the time of making, and subscribing to, the foregoing Certificate and that the attestation of said Clerk is in due form of law, and by the proper officer.

IN TESTIMONY WHEREOF, I do hereby subscribe my name, at Cincinnati, this 26th day of February A. D. 1953.

/s/ STANLEY MATTHEWS,
Presiding Judge of the Court of Appeals of Hamilton County, Ohio.

THE STATE OF OHIO, }
HAMILTON COUNTY } ss

I, Elmer F. Hunsicker, Clerk of the Court of Appeals of Hamilton County, Ohio, do hereby certify that Stanley Matthews whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Presiding Judge of the Court of Appeals of Hamilton County, Ohio, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

IN TESTIMONY WHEREOF, I, the Clerk aforesaid, have hereunto set my hand, and affixed the Seal of the said Court, at Cincinnati, in said county, this 26th day of February A. D. 1953.

/s/ ELMER F. HUNSICKER,
Clerk Court of Appeals of Hamilton County, Ohio.

[SEAL]

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 665

JACOB LICHTER AND JENNIE L. LICHTER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 106-110) is reported at 17 T.C. 1111. The opinion of the Court of Appeals (R. 132-134) is reported at 201 F. 2d 49.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1952. (R. 131.) The petition for a writ of certiorari was filed on March 17, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether certain payments made by the Southern Fireproofing Company, a partnership composed of taxpayers herein, into its bonus and profit sharing plan for the benefit of certain of its employees, are deductible on its and taxpayers' income tax returns for 1942 and 1943 under Section 165(a) and Section 23(p)(1)(A) and (D) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are printed in the Appendix, *infra*, pp. 8-15.

STATEMENT

In 1941, the Southern Fireproofing Company, a partnership, composed of the taxpayers herein, initiated a bonus and profit-sharing plan for certain of its employees by means of a trust agreement executed between them, as partners in that company, and the Central Trust Company of Cincinnati, Ohio, as trustee. (R. 102.) Taxpayers made an initial deposit of $9,000 in the trust fund (R. 102-103), and subsequently in 1942 and 1943, respectively, made contributions thereto of $8,200 and $12,000 to be used for the benefit of certain named employees. One employee, Herbert L. Pullen, had been employed under a contract calling for the payment of a bonus to him each year in addition to the annual salary for which he contracted. Pursuant to the provisions of the agreement, the amount of bonus called for in 1942 was $6,000. The wage stabilization unit of the Bureau of Internal Revenue disallowed payment of any amount in

excess of $1,500. Thereupon $1,500 was paid directly to Pullen and bonds with a face value of $6,000 costing $4,514 were deposited to his credit in the bonus and profit-sharing plan. This payment to his account was made on April 9, 1943. Upon his death, in 1945, his estate made demand for the payment of Pullen's share in the plan. This demand was refused and suit was brought to compel payment thereof. That action was pending at the time of the Tax Court's decision. (R. 105-106.) Subsequently, the Ohio Court of Appeals, after trial of that action, ordered the bonds delivered to the administrator of Pullen's estate. (Pet. App. 9a-10a.) Taxpayers have filed a petition for certiorari, now pending, to the Supreme Court of Ohio in which they seek a review and reversal of the decision of the Ohio Court of Appeals. (Pet. 6.)

Under the trust instrument involved, the duties, powers and acts of the trustee were limited to the directions and instructions of an advisory board, consisting of employees and retired employees of the Company who were appointed and subject to removal by the taxpayers. (R. 103.)

The trust instrument also provided that the trustee might purchase annuity or life insurance policies on such individuals or group of individuals as the advisory board might direct; that the trustee might exercise any of the rights and options guaranteed by such policies or contracts, including the right to change the beneficiary to a person or persons having an insurable interest in the life of the insured, upon written direction from the advisory

board requesting such change; and that in the event that the partnership was declared bankrupt or insolvent, or in the event of dissolution, merger or consolidation without provisions being made for the continuance of the trust, the trust property was to be distributed or disposed of in accordance with the instructions of the advisory board, and the trust terminated. (R. 104.) It was further provided that notwithstanding anything in the trust agreement to the contrary, under no circumstances was any policy or the proceeds thereof, or any other property or assets of the trust, to revert to the partnership, and that the partnership was not to be entitled to exercise any rights or options in regard to the policies, property or assets, or derive any benefits therefrom (R. 104); subject to the foregoing restrictions, the partnership retained the right to amend or modify the provisions of the trust agreement. (R. 105.)

Taxpayers claimed the above-mentioned payments as deductions on their partnership returns for 1942 and 1943. (R. 78, 82.) The Commissioner of Internal Revenue disallowed these deductions as improper under Sections 23 and 165 of the Internal Revenue Code and asserted a deficiency against each taxpayer accordingly. (R. 16-17, 28-29.) The Tax Court sustained the Commissioner in his determinations (R. 107-110) and the Court of Appeals affirmed (R. 131).

ARGUMENT

The petition presents no question of any general importance warranting review by this Court.

The question presented involves the right to deductions under Sections 165(a) and 23(p)(1)(A) and (D) of the Internal Revenue Code (Appendix, *infra*, pp. 8-10) of contributions to a bonus and profit-sharing plan. As presented here, that question involves only the construction of a particular trust instrument. The decision of the court below is correct and is in accord with *Charles E. Smith & Sons Co.* v. *Commissioner,* 184 F. 2d 1011 (C.A. 6th), certiorari denied, 340 U. S. 953, motion for leave to file petition for rehearing denied, 341 U. S. 937; *Roberts Filter Mfg. Co.* v. *Commissioner,* 174 F. 2d 79 (C.A. 3d); *Robertson* v. *Steele's Mills,* 172 F. 2d 817 (C.A. 4th); and *South Texas Commercial National Bank of Houston* v. *Commissioner,* 7 T.C. 764, affirmed, 162 F. 2d 462 (C.A. 5th), certiorari denied, 332 U. S. 772. There is no conflict.

The conflict alleged is with a decision of an intermediate state court, which taxpayers are still litigating and in which it was held that the administrator of Pullen's estate was entitled to certain bonds which had been purchased by the trustee in the name of Pullen, a former employee, with funds representing excess salary, payment of which had been disallowed as being in violation of the provisions of the Stabilization Act of 1942.[1] It is not clear on what basis recovery of the bonds was sought in the state court. The decree of the Ohio state court was based upon stipulated facts (Pet.

[1] Act of October 2, 1942, c. 578, 56 Stat. 765, Section 1 (50 U.S.C. App. 1946 ed., Section 961).

App. 9a), not disclosed, and may not have consisted of the same facts, found by the Tax Court herein, on which the lower court based its judgment.

In any event, the decision of the state court with respect to the right of the administrator of Pullen's estate to the bonds can have no effect upon the question of deductibility of contributions to the bonus and profit-sharing plan established by the partnership. This is so because the funds used to purchase the bonds represented the portion of Pullen's salary which had been determined to be excessive under the Stabilization Act of 1942, *supra*.

Section 29.23(p)-1 of Treasury Regulations 111 (Appendix, *infra*, pp. 11-12), interpreting Section 23(p)(1) of the Code (Appendix, *infra*, p. 8), specifically provides that payments to a bonus and profit-sharing plan shall be disallowed as a deduction under Section 23(p) of the Code when determined to have been made in contravention of the Stabilization Act of 1942. Thus it is clear that under no circumstances can the decision of the Ohio state court, with respect to the right of the administrator of Pullen's estate to the bonds, determine the deductibility of that item. The item is clearly not deductible by the partnership under Section 23(p).

The petition for certiorari therefore presents no question of conflict of decisions, nor does it present any substantial grounds warranting review of the decision of the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
ALEXANDER F. PRESCOTT,
GEORGE F. LYNCH,
Special Assistants to the Attorney General.

APRIL, 1953.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

* * * * *

(p) [As amended by Section 162(b) of the Revenue Act of 1942, *supra*] *Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred-Payment Plan.*—

(1) *General Rule.*—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under subsection (a) but shall be deductible, if deductible under subsection (a) without regard to this subsection, under

this subsection but only to the following extent:

(A) In the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 165(a), * * *

* * * * *

(D) In the taxable year when paid, if the plan is not one included in paragraphs (A), (B), or (C), if the employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 165 [As amended by Section 162(a) of the Revenue Act of 1942, *supra*]. *Employees' Trusts.*

(a) *Exemption from Tax.*—A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall not be taxable under this supplement and no other provision of this supplement shall apply with respect to such trust or to its beneficiary—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and

income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

* * * * *

(26 U.S.C. 1946 ed., Sec. 165.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 162. PENSION TRUSTS.

* * * * *

(d) *Taxable Years to Which Amendments Applicable.*—The amendments made by this section shall be applicable as to both the employer and employees only with respect to taxable years of the employer beginning after December 31, 1941, except that—

(1) In the case of a stock bonus, pension, profit-sharing, or annuity plan in effect on or before September 1, 1942,

(A) such a plan shall not become subject to the requirements of section 165(a)(3), (4), (5), and (6) until the beginning of the first taxable year beginning after December 31, 1942,

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(p)-1. CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED PAYMENT PLAN—*In General.*—Section 23(p) prescribes limitations upon deductions for amounts contributed by an employer under a pension, annuity, stock bonus, or profit-sharing plan, or under any plan of deferred compensation. It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees. Section 23(p) does not cover contributions or compensation which give the employee or former employee present benefits such as life insurance protection. The cost of such benefits is deductible to the extent allowable under section 23(a). See section 29.165-6. Section 23(p), however, is applicable to all contributions under a stock bonus, pension, profit-sharing, or annuity plan, whether or not the employee's rights in such contributions are nonforfeitable.

A contribution to be deductible under section 23(p) must be an ordinary and necessary expense which would be deductible under section 23(a) if it were not for the fact that the statute specifically provides that it shall be deductible under section 23(p). * * *

Section 23(p) is not confined to formal stock bonus, pension, profit-sharing, and annuity plans, or deferred compensation plans, but it includes any method of contributions or compensation having the effect of a stock bonus,

pension, profit-sharing, or annuity plan, or similar plan deferring the receipt of compensation. * * *

Deductions under section 23(p) are generally allowable only for the year for which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his return on the accrual basis. * * *

Any payments shall be disallowed as a deduction under section 23(p), if determined by the National War Labor Board, the Secretary of Agriculture, or the Commissioner to have been made in contravention of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes," as amended (Public Law 729, Seventy-seventh Congress; Public Law 34, Seventy-eighth Congress), or of the regulations, orders, or rulings promulgated thereunder.

SEC. 29.23(p)-11. CONTRIBUTIONS OF AN EMPLOYER UNDER A PLAN THAT DOES NOT MEET THE REQUIREMENTS OF SECTION 165(a) (SECTION 23(p) (1)(D)).—Subparagraph (D) of section 23(p)(1) covers all cases for which deductions are allowable under section 23(p) (1) but not allowable under subparagraphs (A), (B), (C), or (F) of such section. No deduction is allowable under section 23(p)(1) (D) for any contribution paid or accrued by an employer under a stock bonus, pension, profit-sharing, or annuity plan, or for any compensation paid or accrued on account of any employee under a plan deferring the receipt of such compensation, except for the year when

paid, and then only to the extent allowable under section 23(p)(1). See section 29.23 (p)-1. If payments are made under such a plan and the amounts are not deductible under the other subparagraphs of section 23(p)(1), they are deductible under subparagraph (D) to the extent that individual employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid. As to what constitutes nonforfeitable rights of an employee, see section 29.165-7. If an amount is accrued but not paid during the taxable year, or if paid during the taxable year and the employees' rights are forfeitable at the time the amount is paid, no deduction will be allowed the employer for such amount for such taxable year.

SEC. 29.165-1. EMPLOYEES' TRUSTS.—*(a) In general.*—In order that a trust may be exempt under section 165(a) it must be part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries. The trust must be formed and availed of solely to aid in the proper execution of a plan which is a definite written program and arrangement communicated to the employees, solely designed and applied to enable such employees or their beneficiaries to share in the capital or profits of such employer's trade or business or to provide for the livelihood of such employees or their beneficiaries after the retirement of such employees.

The term "plan" implies a permanent as distinguished from a temporary program. * * *

* * * * *

SEC. 29.165-2. IMPOSSIBILITY OF DIVERSION UNDER THE TRUST INSTRUMENT.—*(a) In general.*—Under section 165(a) (2) a trust is not exempt unless under the trust instrument it is impossible (in the taxable year and at any time thereafter prior to the satisfaction of all liabilities to employees or their beneficiaries covered by the trust) for any part of the trust corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. As used in section 165(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. It is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, but it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries. As used in section 165(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to

employees or their beneficiaries covered by the trust.

* * * * *

SEC. 29.165-7. TREATMENT OF BENEFICIARY OF A TRUST NOT EXEMPT UNDER SECTION 165 (a).—Any contribution made by an employer on behalf of an employee to a trust during a taxable year of the employer which ends within or with a taxable year of the trust for which the trust is not exempt under section 165(a), shall be included in income of the employee for his taxable year during which the contribution is made if the employee's beneficial interest in the contribution is nonforfeitable at the time the contribution is made. An employee's beneficial interest in the contribution is nonforfeitable within the meaning of sections 165(c) and 23(p)(1)(D) at the time the contribution is made if there is no contingency under the plan which may cause the employee to lose his rights in the contribution.
* * *

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